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IN THE

Supreme Court of the United States

RICHARD A. TROPP, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

CORPORATION OF LLOYD'S ALSO KNOWN AS THE SOCIETY OF LLOYD'S,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF *AMICUS CURIAE* OF AMERICAN NAMES ASSOCIATION IN SUPPORT OF PETITIONER RICHARD A. TROPP

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INTEREST OF *AMICI CURIAE*

American Names Association is a national, professional organization whose mission is to educate the public, legislators and the courts on the Lloyd's crisis and to assist American investors in Lloyd's ("Names").[1] At its peak, the ANA membership was

[1] The letters of consent have been lodged with the Clerk of the Court by both petitioner and respondent. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than ANA and Law Offices of Greg J. Ryan, who authored this brief pro bono, made any monetary contribution to the preparation or submission of this brief.

approximately 1,000 of the approximately 3,000 Names in the Unites States. The resolution of the issue presented in this case is of great importance to ANA and its members who remain exposed to Lloyd's efforts to collect on its English Judgments.

The Law Offices of Greg J. Ryan represented 17 California Names in a recognition action filed by Lloyd's in the United States District Court for the Southern District of California, *Soc'y of Lloyd's v. Blackwell*, 127 Fed. Appx 961 (9th Cir. 2005). Greg J. Ryan, Esq. is admitted to practice before the United States Supreme Court. Mr. Ryan has prepared this brief pro bono on behalf of himself and the ANA. The California Names represented by this firm were, for the most part, not sophisticated investors. Many of them had already sold off their property to pay Lloyd's and were facing the loss of their homes and ability to afford health care. It is no exaggeration to say that the loss of funds to Lloyd's left many Names destitute.

SUMMARY OF ARGUMENT

The story of the crisis at Lloyd's and the response thereto is a complicated one. But the issue before the Court is a narrow one: Is the Uniform Foreign Money Judgments Recognition Act, as applied by New York and other jurisdictions, compatible with the requirements of the Due Process Clause? The case before the Court is compelling and involves fundamental public policy issues affecting American citizens.

The English money judgment in this case arose out of the most catastrophic insurance loss in history and is the result of a well-documented but unlitigated fraud scheme by Lloyd's. American Names, including Mr. Tropp, were recruited as investors by agents of

Lloyd's as a part of a massive recruitment campaign in the 1970's and 1980's with assurances that Lloyd's was a sound and conservative investment. What Lloyd's knew but the Names were deliberately *not* told was that they were assuming unlimited liability for guaranteed losses because by the time they joined Lloyd's, it was facing devastating and unquantifiable losses due to broadly worded comprehensive liability policies written decades earlier. Without their knowledge, Lloyd's placed American Names in syndicates that it knew, in time, would face tens of thousands of claims due to asbestos contamination. By departing from centuries of tradition and recruiting American Names and others in an effort to dilute liability for asbestos losses, Lloyd's was able to stave off disaster for more than a decade. But when the losses exploded publicly in 1991, the American Names were among those who faced personal financial ruin.

Although the American Names have a compelling fraud defense, they have never been able to assert it, in spite of the fact that judgments have been entered against them by English courts and Lloyd's now seeks to collect on those judgments in this country. That is in large part because no remedy existed under English law for Lloyd's fraudulent failure to disclose material facts to Names. In a series of decisions, the English Courts ruled that Lloyd's owed no duty to the Names to regulate the business of insurance at Lloyd's lawfully or in good faith or with reasonable care or diligence. The English Courts reaffirmed that, under English law, Lloyd's owed no duty in tort to make disclosure of material information to Names.

The Uniform Foreign Money Judgments Recognition Act permits a court to enforce the English

judgments only if they were obtained in accordance with due process and public policy – that is, only if there really was a meaningful opportunity to be heard and the judgments are not contrary to fundamental public policy. Treating the Name's allegations that they were fraudulently induced into investing in Lloyd's as an irrelevancy, English courts bound American Names to an unconscionable contract, precluded them from raising any affirmative defenses, and prevented them from discovering or presenting any evidence to challenge the existence or amount of their alleged liability.

With their English judgments in hand, Lloyd's initiated a wave of litigation in United States courts for recognition and enforcement of the judgments. But even this litigation offered Names no chance to litigate the merits of their fraud claims against Lloyd's. As noted by the District Court in this case, the Names were singularly unsuccessful in decisions by courts across the country. The fulcrum for these decisions was the "system-level" analysis under the UFMJRA, which is to say that there was no analysis of the fairness of the procedures applied in particular cases – it was only noted that the judgments were obtained under the English system and therefore, were presumed to be fair. *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000).

When it comes to Lloyd's and what happened to the Names in the U.K., the "system" was anything but fair. It is respectfully submitted that this Court should grant Mr. Tropp's petition for a writ of certiorari.

ARGUMENT

I. Due Process Requires U.S. Courts To Examine What Actually Happened In England and Not Just Presume The English System Afforded Due Process

The English proceeding, based on the "pay now sue later" and "conclusive evidence" clauses, was essentially one of "summary prejudgment." *Fuentes v. Shevin*, 407 U.S. 67, 72 n.5 (1972). Upon receiving the complaint, the Names were to submit their property to Lloyd's without any chance before judgment – indeed before a separate protracted and expensive proceeding – to litigate their defense of fraud. And because of the "conclusive evidence" clause, the Names were not apprised of the basis for calculation of the amounts claimed, nor where they permitted to inquire into that basis. Absent some "extraordinary" situation, however, the "root requirement" of procedural due process is that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Id.* at 82, quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971); *U.S. v. James Daniel Good Realty*, 510 U.S. 43 (1993); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Connecticut v. Doehr*, 501 U.S. 1 (1991). And the reason is plain:

> The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party.

Fuentes, 407 U.S. at 81 (1972). It is thus well-established that, save in "extraordinary situations," *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969), Tropp's rights to due process entail "an opportunity to be heard 'at a meaningful time and in a meaningful manner." *Fuentes*, 407 U.S. 67 (1972). What Names received in England, however, contained none of the reality, and scarcely the hint of even the appearance, of such meaningful right to be heard.

In the case at bar, the cumulative effect of Clauses 5.5 and 5.10 of the Equitas Contract is that the Names cannot have a hearing on the merits of their defense, cannot have discovery as to the amount claimed and cannot even challenge the opposing party's calculation of the amount due. Clause 5.10 alters the usual evidentiary rules to provide, in effect, that only Lloyd's may introduce evidence. The effect of all this is to turn the court into a rubber stamp. In short, there is no meaningful pre-deprivation hearing under the Lloyd's Equitas scheme, either before or after judgment.

The Names were not provided with a meaningful opportunity to raise their defenses to payment of the Equitas premium. The Names were merely allowed to litigate whether they had the right to raise such defenses before a judgment was entered. In reality, the only thing litigated in England was whether the Names would be denied their right to assert their affirmative defenses. Because the English court precluded such defenses, the merits of the Names fraud defenses were never litigated. For Lloyd's, it was like shooting fish in a barrel.

Until Names are given a meaningful opportunity to evaluate the amount of the claims against them and

to contest the validity of the claims of the grounds of fraud, it is clear that enforcement by U.S. Courts of the foreign judgments at Lloyd's behest would ratify the violation of well-established norms of due process of law by which Lloyd's obtained the judgments. *James Daniel Good Realty, supra; Fuentes, supra; Sniadach, supra; Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The general rule that state processes may not be deployed to take property before a hearing is made available to determine the would-be taker's right is not absolute. Where the taker's interests are great, and those of the person whose property is in jeopardy are slight, pre-hearing deprivation may be permissible provided the risk of error is small, post-deprivation hearing is expeditious and sure, recompense is available if there is error. *Mathews v. Eldridge, supra; U.S. v. James Daniel Good Realty, supra.* The balance in this test and in this case is overwhelmingly in Tropp's favor.

First and foremost, the Names' interests are in their property, which may be subject to levy and execution if the Lloyd's judgment is recognized and enforced. This is no small interest, as the amount of the Lloyd's judgment represents a multiple of Tropp's entire net worth. Second, Names have a valid and judicially cognizable interest in an accurate and complete report of Lloyd's claims, including an understanding of the reasons for the enormous losses. Lloyd's never has been willing to provide Names with this information. It can be obtained only through the power of the courts. Third, Names have an interest in a fair and complete adjudication of their claims that Lloyd's committed fraud against them.

Separately and collectively, these interests are grave indeed.

Lloyd's attempts to align its interests in pre-hearing deprivation with the interests of its former policyholders. But Equitas has already been fully funded, and Lloyd's is suing the Names as Equitas' assignee, for its own account. It is to Equitas that relevant policyholders must now look, not to Lloyd's. Equitas already has all the funds it required as a condition of entering into the Equitas Reinsurance Contract. There is thus no reason for imposing a "pay now, sue later" and "conclusive evidence" regime on the Names except to deliver an overwhelming strategic advantage to Lloyd's in litigation, enabling it effectively to escape scrutiny, and ultimately liability, for any fraud committed against the Names in the course of their disastrous relationship with Lloyd's.

Lloyd's has implied that Names have available to them a separate action in England for fraud through which they could recover their property even if it is taken before determination of the fraud question. But pre-hearing deprivations are permitted only in situations of exigence. *See, e.g., James Daniel Good Realty, supra.* Lloyd's neither pleaded, nor did the English courts hold, that the circumstances were so exigent that a pre-hearing deprivation of property could be justified.

Lloyd's contention that the Names are free to litigate their claims against it in a separate, subsequent proceeding after they have paid the Equitas judgment is fictive for 2 reasons: For many Names, such as Tropp, the resources to undertake such a separate suit after they have been financially devastated by paying out the funds demanded in this

action, is illusory. Second, under English law, there is no effective remedy against Lloyd's for fraudulent non-disclosure because English law does not recognize Lloyd's duty to disclose material facts of which Lloyd's had exclusive knowledge. *Soc'y of Lloyd's v. Jaffray*, 2000 WL 1629463 (Queen's Bench Division (Comm. Court), Nov. 3, 2000) (Creswell, J). *Aff'd* (2002) 146 S.J.L.B. 214 (AC) *available at* 2002 WL 1654876.

Under English law, Lloyd's liability would be based on the principle of *caveat emptor* and thus, no consideration would be given by the English courts to the Names' allegations that Lloyd's breached any duty to disclose material facts to the Names. *Jaffray* 21-25.

The risk of error is enormous where, as the court in England freely acknowledged, when discussing the "conclusive evidence" clause that Lloyd's records and calculation are to be conclusive evidence (that is to say the only evidence) unless there is a manifest error on the face of those records. And refusing to require disclosure of the records by Lloyd's to the defendants, the court held that it is for the name to identify and demonstrate some clear error. *Soc'y of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.) *available at* 1998 WL 1043675.

It is hard to imagine a better prescription for error than to allow only one side to introduce evidence and to deny the other side discovery with respect to it. The balance of interests then is fairly simple to state: the financial ruin of individuals, with all the attendant horrible consequences for family members and persons who may be dependent upon them, as against the speedy provision of funds to a corporation

that has neither pleaded nor presented exigent circumstances.

II. THE LLOYD'S JUDGMENTS ARE REPUGNANT TO U.S. SECURITIES LAWS

It is beyond question that the U.S. Securities Law expresses the fundamental public policy of the United States. The protection of unwary investors from being duped by unscrupulous sellers of securities is an exigency of the utmost priority in contemporary society. The central objective of the securities laws is to protect the public against unlawful and fraudulent investment schemes and to promote full disclosure of all information that is necessary to make an investment.

This Court has repeatedly explained that the U.S. securities laws were intended to remedy the deficiencies of the common law. For example, the Court stated in *Herman and MacLean v. Huddleston*, 459 U.S. 375 (1983) at 388-89:

> "[T]he typical fact situation in which the **classic tort of misrepresentation and deceit evolved was light years from the world of commercial transactions to which Rule 10b-5 is applicable.** Moreover, **the antifraud provisions of the securities laws are not coextensive with common law doctrines of fraud. Indeed, an important purpose of the federal securities statutes was** to rectify perceived deficiencies in the available common law protections by **establishing higher standards of conduct** in the securities industry."

In *Securities & Exchange Commission v. Capital Gains Research Bureau, Inc.* 375 U.S. 180 (1963) the Court stated, at 188:

> "The Investment Advisers Act of 1940 was the last in a series of Acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's. It was preceded by the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, and the Investment Company Act of 1940. **A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor** and thus to achieve a high standard of business ethics in the securities industry."

The *Jaffray* case shows that the English law applied to Names was indeed "light years" from the policies embodied in the U.S. securities law. For example, the definition of "fraud" applied by the *Jaffray* court was one that excluded from the definition the withholding of material facts from the Names. According to the *Jaffray* decision, the only way the Names could prove "fraud" as so defined, was to show knowing or reckless falsehood. The *Jaffray* court held that "mere omissions are not sufficient." (at ¶ 29) Furthermore, even when the *Jaffray* court found as a fact that it had been falsely represented to prospective Names "that there was in place a rigorous system of auditing," the court concluded that the Names were not entitled to any relief, because "the Names had however failed to prove that Lloyd's did not believe the representations to be true or that they even knew that they were or became untrue or were reckless as to whether they were true or untrue." (¶ 587 vi) The English court applied a common law standard closely akin to the doctrine of

caveat emptor, which was and is completely foreign to the policies of U.S. securities laws.

Lloyd's led the U.S. courts to believe that the remedies in England would vindicate the Names' substantive rights and would not subvert the policies of federal and state securities' law of insuring "full and fair disclosures" by issuers. *Bonny v. Society of Lloyd's*, 3 F.3d 156 at 161 (7th Cir. 1993), had held that "remedies in England vindicate plaintiffs' substantive rights while not subverting the United States' policies of insuring full and fair disclosures by issuers and deterring the exploitation of U.S. investors"; and *Roby v. Corporation of Lloyd's*, 996 F2d. 1353, at 1364 (2nd Cir. 1993) had held: "the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors."

It is clear from these opinions that the courts were convinced by Lloyd's that in England, American investors would not be deprived of the ability to obtain redress for material non-disclosures or for having been fraudulently induced to invest in Lloyd's.

That representations of Lloyd's were untrue has now been established by a number of sources, including the case of *Society of Lloyd's v. Jaffray*, Queens Bench Division (Commercial Court), November 3, 2000, affirmed by Court of Appeal on July 26, 2002.

The *Jaffray* decision reveals that contrary to the representation by Lloyd's to the U.S. courts, the Names had: (a) no remedy under English law for Lloyd's failure to disclose material facts to the Names being recruited to unknowingly assume massive underwriting liabilities previously incurred; (b) no remedy of rescission; (c) no remedy for negligent mis-

representation; and most critically, (d) no remedy that fulfilled the policy of the United States securities laws.

Some of the portions of *Jaffray* that contradict Lloyd's representations to U.S. courts are set out below:

> "28. It is no doubt because of the decisions and reasoning in some of these cases that we are not concerned with a case which alleges that Lloyd's are liable to the Names because of a breach of contract. **Nor are we concerned with the breach of an alleged duty of care, whether committed in bad faith or otherwise. In particular, we are not concerned with a case based upon the allegation that Lloyd's fraudulently failed to disclose material facts to prospective Names. Any such case is not within the threshold fraud issue.**
>
> "29. This is important because a significant amount of the argument of the litigants in person, and particularly Sir William Jaffray, sought to advance just such a case. For example, **It was said that** Lloyd's motto is "Fidentia" that **Lloyd's owed the Names a duty of the utmost good faith and that Lloyd's was in breach of that duty in that it fraudulently failed to give information to prospective Names as to the risks associated with asbestos related claims because it knew that, if it did, prospective Names would be put off.** Submissions along these lines were advanced with great vigor and conviction, but **they cannot assist the Names in this appeal because in order to establish the tort of deceit the Names must establish relevant**

fraudulent misrepresentations. ***Mere omissions are not sufficient.***"

"398 . . . . **We're of the strong view that the decision not to refer to asbestosis at the Rota meetings was misguided, and so misguided as to have given rise to suspicion as well as resentment in many names. But it does not follow that the decision was dishonest nor does it necessarily lead to the conclusion that Lloyd's was guilty of any dishonest representation.**"

"454. **It is clear that** during **this period Lloyd's was encouraging new membership.** At a Council Meeting of **13 May 1985, the new Chairman Mr. Peter Miller referred to a paper to be circulated to Chairs 'indicating the line which would be taken . . .** in forthcoming speeches which will encourage applications for membership . . . **This will take account of the need for increased membership as a result of a shortage of capacity** and the conflicting adverse publicity arising from **reported underwriting losses for recent years.' On July 5, 1985, Sir Peter Green wrote his 'fishing trip letter'** quoted at paragraph 233 above. The letter is much relied by the names because of its reference to the 'overpayment of past profits is falling for recoupment from a far larger number of current names' and the reference to it being critical if old names were to resign or new names would not join. But **the letter also reflects** the difficulty with the Revenue and states that **'there are plenty of horrors in the pipeline** and they must be reserved for even if the figures are not available.

The "true and fair" requirement should assist in this."

"477. We **have great anxiety about the fact that names continued to join Lloyd's and be placed on syndicates which were infected by the long-tail liabilities, where the premium received for the outstanding liabilities was in the event massively too little.** The risk of that premium being inadequate must on any view have been increasing during this period, and **we see no sign of anyone at the centre contemplating that a warning of the increased risk should be given (for instance, at Rota) to names, and particularly new names.** The attitude was that it should be left to members' agents. Relevant documents such as Sir Peter Green's fishing trip letter did not focus on the position of new names, (in the sense of future names) at all. So far as persons at the centre were concerned, they were faced with the following facts: **profits had been distributed in the 1950's and 1960's and it was people who had become members since those days who were going to have to pay the losses;**

"587. As to the appeal on the grounds for which permission has been given, **our conclusions may be summarised as follows:**

i. **There was representation in the 1981 brochure that there was in place a rigorous system of auditing which involved the making of a reasonable estimate of outstanding liabilities including unknown and unnoted losses.** (Paragraph 321)

ii. **Subsequent brochures contained essentially the same representation, even though the word 'rigorous' no longer appeared.** (Paragraph 323)

iii. The 1981 brochure also contained a representation that Lloyd's believed that such a system was in place. So did subsequent brochures. (Paragraphs 321 and 323).

iv. The globals contained no relevant representations. ((Paragraphs 326 and 343).

v. **The representations in (i) and (ii) were during the relevant period, untrue.** (Paragraphs 375 and 376).

vi. **The Names have however failed to prove that Lloyd's did not believe the representations to be true or that they either knew that they were or became untrue or were reckless as to whether they were true or untrue.** (Section VII).

vii. **It follows that the judge was right to determine the threshold fraud issue in favour of Lloyd's** and to hold that Lloyd's is not liable to the Names in the tort of deceit. It further follows that the appeal on the merits, which the Names had permission to bring, fails and must be dismissed.

In 1997, the English Court held in *Soc'y of Lloyd's v. Lyon, Leighs & Wilkinson* CLC 1398 (1997) *available at* 1997 WL 1104500 that the Names were not entitled to litigate claims of fraud in the inducement of their membership or underwriting at Lloyd's as

a set-off to their obligations to pay the Equitas premium.

There was a huge gulf between what Lloyd's told the U.S. Courts and the harsh truth about the lack of remedies the Names had against Lloyd's in England. The U.S. Courts assumed, in the absence of evidence otherwise, that the Names would have adequate safeguards and remedies. More particularly, the U.S. court could not have anticipated that the Names would be deprived of their day in court on their fraud claims because the Equitas contract was not even in issue. It was not until it was free of the U.S. courts, that Lloyd's divulged the terms of the Equitas contract and thus revealed previously undisclosed limitations on the Names' ability to pursue their defenses including: (a) the "conclusive evidence" clause of the Equitas contract which prevented American Names from challenging the computations of the Names' liability for the Equitas premium (which is the basis for the present judgment) – decisions of the English courts found as a fact that they contained errors and were unreliable, *see Society of Lloyd's v. Fraser*, [1998] C.L.C. 1630 (C.A.) *supra* and (b) the "pay now, sue later" clause of the Equitas contract which Lloyd's used to prevent these Names and others from raising Lloyd's fraud as a set-off or defense to Lloyd's claims.

The Names do not claim that the entire English legal system is lacking in due process and inadequate, but they do assert that in the instance of the American Names, and when it comes to Lloyd's, the English system is anything <u>but</u> fair or impartial. Lloyd's misrepresented the law of England, and while it was assuring U.S. Courts that the Names would have effective remedies in England, Lloyd's was

secretly taking steps to further deprive the American Names, including Mr. Tropp, of due process in the English legal system. The judgments were imposed without adequate safeguards and protections of the Names against fraud and misrepresentation in the sale of securities. All of this was in contradiction to the Lloyd's representations to the American courts that American Names would be provided with full due process, adequate remedies at law and in equity, and with *remedies that would fulfill the policies of the American securities laws.*

Names are not seeking to "relitigate" defenses they raised and lost in England. To the contrary, the Names are asking the Court not to enforce the English judgments precisely because they were not permitted to litigate their fraud defenses at all. The Names were not allowed to litigate Lloyd's fraud in inducing their investment and participation as Names. The Names were not allowed to litigate Lloyd's and AUA9's breaches of fiduciary duty in binding them to the Equitas contract. The Names were not allowed to obtain discovery, or to refute in any way, the basis of their alleged liability for insurance losses, the amount of such losses, or the method of calculating such losses. Moreover, under English law, fraudulent non-disclosure by Lloyd's is not an actionable wrong and there was not consideration given, nor could there have been consideration given, by the English courts to the Names allegation that Lloyd's breached a duty to disclose material facts to the Names. *Jaffray* ¶ 21-25.

CONCLUSION

In an enforcement proceeding, the U.S. Courts do not act as mere implementers of an earlier foreign decision. For sound policy reasons, a degree of defer-

ence is given to a foreign decision. *Hilton v. Guyot*, 159 U.S. 113, 16 S.C. 139 (1895). But that deference is in no sense dictated by legal compulsion. It has always been recognized as grounded in a choice that is made by the adjudicating jurisdiction. That is why states provide for non-recognition of foreign judgments in appropriate cases. England may be content, at least where Lloyd's of London is concerned, with the deprivation of English property without any effective ability of the property-holder to interpose relevant defenses before that property is taken. But the property here sought resides in the United States, not in England. It would be an affront to the most cherished ideals of American law – and a violation of explicit U.S. law – if that property should be surrendered before there has been a thorough airing of the Names' side of the case.

On this petition, Tropp faces the prospect that he will have gone to the U.S. Courts, then to the English Courts, and then back to the U.S. Courts without ever having a determination on the merits of his claim that Lloyd's deliberately misled him into investing in Lloyd's. For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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